

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**STATE OF MISSOURI,
RESPONDENT**

vs.

**JOSEPH B. SPROFERA,
APPELLANT**

DOCKET NUMBER WD75698

DATE: MARCH 4, 2014

Appeal from:

The Circuit Court of Clay County, Missouri
The Honorable Larry D. Harman, Judge

Appellate Judges:

Division Four: James E. Welsh, C.J., Joseph M. Ellis and Gary D. Witt, JJ.

Attorneys:

Daniel N. McPherson, for Respondent

S. Kate Webber, for Appellant

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI, RESPONDENT

v.

JOSEPH B. SPROFERA, APPELLANT

WD75698

Clay County, Missouri,

Before Division Four Judges: James E. Welsh, C.J., Joseph M. Ellis, J. and Gary D. Witt, J.

In March of 2012, Appellant Joseph B. Sprofera was charged by information in lieu of an indictment with one count of statutory rape in the first degree. The charge arose out of allegations that between July 1, 2002, and August 31, 2002, Appellant engaged in sexual intercourse with his adopted daughter J.M.S. At trial, J.M.S. testified that when she was about six or seven years old, Appellant began touching her inappropriately while she slept. She further testified that Appellant raped her in the summer before she started the eighth grade – which she believed to be 2002 – making her thirteen years old at the time. The State also elicited testimony from J.M.S. that she complied with Appellant's commands out of fear because Appellant had physically abused her, her mother, and her siblings.

During the State's closing argument, the prosecutor misstated that the jury should find Appellant guilty of statutory sodomy in the first degree. The trial court interrupted the prosecutor and informed her that she had misspoken as to the charged offense. The prosecutor corrected herself, then remarked, in front of the jury, that "It's unfortunate that this is not the only case of statutory rape or sodomy that sits in a box over (indicates) here to be taken up today." Following the comment, the trial court explained to the jury that he had other cases involving statutory rape and sodomy to take up that day and those cases were "not related to [Appellant] in this trial."

The case was subsequently submitted to the jury, which found Appellant guilty as charged. At his sentencing hearing, the trial court reiterated its finding that Appellant was a prior offender based upon his September 1, 2010 conviction for second-degree statutory sodomy. The court then sentenced Appellant to life imprisonment but did not pronounce whether the life sentence was to be served consecutive to or concurrent with Appellant's previous sentence for his 2010 conviction. Nevertheless, on September 27, 2012, the trial court entered its written judgment of conviction and sentence stating that "the Court sentences and commits [Appellant] to the Missouri Department of Corrections for a period of Life imprisonment. Sentence to be served consecutive with other sentences." The trial court also failed to memorialize its finding that Appellant was a prior offender in its written judgment. Appellant did not file any post-trial motions

challenging his classification as a prior offender or contesting the trial court's imposition of consecutive sentencing in its written judgment.

Appellant now raises five points of error on appeal.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Division Four holds:

1. The trial court did not err in denying Appellant's motion for judgment of acquittal because the State's evidence was sufficient to establish, beyond a reasonable doubt, that J.M.S. was less than fourteen years old when the rape occurred in that the record reflects J.M.S. consistently testified that the rape occurred before she entered the eighth grade; J.M.S. testified that she was born in 1989 and started the eighth grade in 2002; and J.M.S. ultimately testified that she was confident that she was thirteen at the time of the charged offense. Accordingly, there was sufficient evidence from which a reasonable juror could conclude that J.M.S. was less than fourteen at the time of the charged offense.
2. The trial court did not plainly err by failing to *sua sponte* declare a mistrial when the State elicited testimony from J.M.S. regarding Appellant's uncharged crimes and prior bad acts because evidence that Appellant began touching J.M.S. inappropriately when she was approximately six or seven years old and that such abuse continued to worsen over time tends to establish Appellant's motive for the rape; J.M.S.'s testimony regarding a second incident of rape occurring in the days immediately following the charged incident provided the jury with a complete and coherent picture of the circumstances and events that transpired surrounding the charged offense; and evidence of Appellant's prior instances of uncharged physical and verbal abuse was used to establish J.M.S.'s fear of Appellant and her delay in reporting the abuse.
3. The trial court did not plainly err by failing to *sua sponte* declare a mistrial when the prosecutor erroneously stated during closing argument that Appellant was guilty of the offense of statutory sodomy and then, in trying to correct her error, made a reference to other statutory rape and sodomy cases that were to be taken up by the trial court that day because there was no showing that manifest injustice or a miscarriage of justice resulted from the comment in that the trial court's admonition to the jury, when read in context, sufficiently remedied any potential confusion as to the additional cases referenced by the prosecutor by clearly indicating that the other sodomy and rape cases did not pertain to Appellant.
4. The trial court erred in memorializing Appellant's sentence as consecutive because it failed to state the sentencing was consecutive at the time of oral pronouncement and, under Missouri law, when a court fails, at the time of oral pronouncement to state whether a sentence is concurrent or consecutive, the sentence is rendered concurrent. Thus, the judgment must be corrected to reflect concurrent sentencing.

5. The trial court erred in finding Appellant to be a prior offender because the prior finding of guilt used to establish a defendant's prior offender status must have occurred prior to the date of commission of the present offense for which the defendant is being tried. Here, Appellant's prior conviction for second-degree statutory sodomy occurred in 2010 but the date of commission of the present offense is 2002. Accordingly, Appellant's prior second-degree statutory sodomy conviction could not be used to establish his prior offender status because it did not occur prior to the commission date of the present offense. Thus, on remand, any classification of Appellant as a prior offender should be excluded from the written judgment.

Opinion by Joseph M. Ellis, Judge

Date: March 4, 2014

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